European Gas Conference – Master class

European energy law in depth – where is the market headed?

Dr. Florian-Alexander Wesche
Overview

I. Overview on European energy law
II. Direct legal impact of European energy law
III. Current and future European measures to influence (harmonize) the gas markets
IV. Growing influence of European competition law
V. Outlook – European energy law will be the driver
Overview

I. Overview on European energy law
   - Primary and secondary legislation
   - Implementation of European energy policy by secondary legislation: the 3rd Energy Package, Reg. on security of supply

II. Direct legal impact of European energy law

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Primary and secondary legislation

European primary law (TEU, TFEU)

European secondary law (directives, regulations, etc.)

Priority ("effet utile", principle of effectiveness)

National energy law
Primary and secondary legislation

Directives and Regulations

(3rd Energy Package, Regulation on Security of supply, Directive on greenhouse gas emissions allowance trading, etc.)

Art. 4, 26, 101, 107, 170 TFEU

TFEU
Implementation of European energy policy by secondary legislation: the 3rd Energy Package

- 1990 1991
- 1996 1998
- 2003 2005 2009 2011

- 3rd Energy Package Electricity and Gas (as of 2011)
- Gas Transmission Regulation
- Acceleration Directive for Electricity and Gas
- Electricity Trading Regulation

- Gas Transit Directive
- Electricity Market Directive

- Power Transit Directive
- Gas Market Directive
- Electricity Market Directive
Implementation of European energy policy by secondary legislation: the 3rd Energy Package

**Purpose:**
- Continuation of the liberalization in the energy sector in order to achieve a functional internal market;
- Improvement of the energy supply security within the European Community

**Diagram:**
- Directive 2009/72/EC (Electricity)
- Directive 2009/73/EC (Gas)
- Regulation (EC) No 714/2009 (Conditions for access to the Electricity network)
- Regulation (EC) No 715/2009 (Conditions for access to the gas network)
- Regulation (EC) No 713/2009 (Foundation of the European Agency for Cooperation between Energy Regulators (ACER))

**Key Points:**
- Unbundling
- Third country clause
- Cross-border cooperation by the network operators
- Foundation of a European regulatory authority
- Consumer protection
- „Level-Playing-Field-Clause“
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II. Direct legal impact of European energy law
   – Impact on national legislation
   – Impact on national energy regulation
   – Impact on bilateral contracts
     – Transportation (capacity) and storage contracts
     – Supply and purchase contracts
III. Current and future European measures to influence (harmonize) the gas markets
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Impact on national legislation

European Law (EU law)

(Internal market) **Directives** for power and gas

Gas pipeline and electricity trading **regulation**

Implementation into national law required

Direct applicability

Energy Industry Act (EnWG)

**Regulations**

StromNZV / GasNZV / StromNEV / GasNEV / ARegV / NAV / NDAV / StromGVV / GasGVV / KraftNAV / MessZV
Impact on national legislation

- Unbundling of TSOs / DSOs
- Gas Directive
  - Network Development
  - TPA (TSO/DSO, Storage, upstream pipes)
  - Consumer protection

European energy law in depth – where is the market headed?
Impact on national legislation

- Certification of TSOs
- Gas Regulation (access to transmission)
- Network Codes, ENTSOG, Guidelines
- CAM, Balancing
- Tariffs

European energy law in depth – where is the market headed?
Impact on national energy regulation (e.g. Germany)

Federal Network Agency
- Gabi Gas
- VHP fee
- KOLA
- 5% Tolerance
- Notifications
  - KONNI Gas
  - GeLi/WiM

EnWG
GasNZV

Contracts / Associations
- Cooperation Agreement V (KoV V)
  - Sample balancing group contract
  - NCG / Gaspool General Terms
  - Guidelines

European energy law in depth – where is the market headed?

White & Case 13
Impact on bilateral contracts (e.g. Germany)

- **Producer / importer / supplier (transport customer)**
  - Balancing group manager
  - Supply agreement

- **Entry (and exit) agreement**

- **Balancing group agreement**

- **Market area operator (VTP – hub)**

- **Exit agreement**

- **TSO**

- **DSO**

- **End Customer**
  - Agreement on use of connection network
  - Connection network agreement
Adjustments of supply and purchase and transportation contracts

Gas supply agreements

- New market rules, new sourcing opportunities, more liquid markets lead to
  - Price adjustments
  - Adjustment of transportation costs
  - New delivery points

Gas transportation agreements

- No transit contracts allowed - adjustments
- Entry/exit capacity booking (no point-to-point) - Tariff adjustments
- Transparent allocation of new capacity
- Use it or lose it
- Shorter term capacities
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III. Current and future European measures to influence (harmonize) the gas markets
   – European network codes (balancing, capacity allocation, interoperability)
   – Congestion management
   – ACER’s and the commission’s powers
   – Security of supply
   – Exemption procedures for Nabucco, South Stream, etc.?
IV. Growing influence of European competition law
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Current and future European measures to influence (harmonize) the gas markets

**Balancing**
- Status: Network Code (2014)

**Capacity Allocation Mechanisms**
- Status: Framework Guidelines
- Objective: Network Code

**Congestion Management Procedures**
- Objective: Change of Gas Regulation

**Interoperability**
- Status: Framework Guidelines
- Objective: Network Code

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European energy law in depth – where is the market headed?
Case study: Exemption for new infrastructures

New infrastructure
- Interconnectors (e.g. Gazelle, Nabucco, OPAL, BBL)
- LNG facilities
- Storage facilities

Requirements
- Enhancement of competition in supply and security of supply
- High level of risk (w/out exemption no investment)
- Separate entity
- Charges must be levied
- Exemption not detrimental to competition

Scope
- TPA exemption, incl. tariff, capacity allocation
- Unbundling exemption
Case study: Exemption for new infrastructures

Application (w/expert opinions, studies on competition effects, etc.)

Decision of NRA (possible: consultation ACER)

Decision of EU COM

Amended decision of NRA
Case study: Exemption for new infrastructures

- Market test and Open season
- Capacity restriction
- Capacity or gas release programs
- Tariff methodology
- Limited term
Case study: Exemption for new infrastructures

Unrestricted Exemption

Intergovernmental Agreements

Investment security measures

Long-term transportation Agreements

Investment protection Agreements
ACER’s and the commission’s powers
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   – The role of competition law vs. regulated market law
   – ECJ decision (Deutsche Telekom) – a landmark decision
V. Outlook – European energy law will be the driver
The role of competition law vs. regulated market law

Competition law and energy regulation law: Relationship

- Competition law
- Existing competition shall be safeguarded
- Competition shall be „stimulated“
- Energy regulation law as „sector-specific competition law“

European energy law in depth – where is the market headed?
The role of competition law vs. regulated market law

- **Parallel Applicability of energy regulatory and European competition law**
  - EU legal framework does not provide for any delineation
  - European Court of Justice, 14 October 2010, Deutsche Telekom/Commission, C-280/08 P
    - also fees that have been consented to and are regulated can be abusive

- Competition concerns regarding long-term transportation contracts (e.g. old Transit Contracts)
  - foreclosure of wholesale market by withholding capacity

- Competition concerns regarding new infrastructures
  - Capacity hoarding
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   – Growing impact and why European legislation will be the main source of market developments and market design
Outlook

Challenges of the so called „Energiewende“

• Energy efficiency
• Emissions trading
• Development of gas market (demand – supply)
• Impact on allocation of capacities / network expansion (use as reserve of existing/construction of new gas-fired power plants)
• Regulation of gas networks in accordance with electricity network (requirements)?
• Decommissioning of gas networks?

Unconventional Gas from Eastern Europe

Exploitation of other gas fields (e.g. Caspian Sea)

Challenges need joint efforts
EU will play the central role by harmonizing through common policies implemented by Directives and Regulations